

WEINSTEIN, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REYES, M.J.

----- x
LARRY G. PHILPOT,

Plaintiff,

v.

MELVILLE HOUSE PUBLISHING,
LLC,

Defendant.
----- x

CV 18-5515
Case No. _____

FILED
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U.S. DISTRICT COURT E.D.N.Y.
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PLAINTIFF'S ORIGINAL COMPLAINT AND JURY DEMAND

Plaintiff Larry G. Philpot ("Philpot" or "Plaintiff") files this Original Complaint and Jury Demand against Defendant Melville House Publishing, LLC ("Melville House" or "Defendant") on personal knowledge as to all facts regarding himself and on information and belief as to all other matters, as follows:

I.

PRELIMINARY STATEMENT

Photographers create pieces that extend well beyond the four corners of the photograph to evoke sentiments within the viewer so that the viewer is a part of the moment captured in time. For concert photographers, the odds are almost always against them—the musicians are constantly moving, the lighting is usually dark and typically changing, and it is practically impossible to secure a good vantage point. But every now and then, a photographer is able to get a great shot, the kind of iconic shot that does exactly what photographs are supposed to do, make the viewer a part of that very moment in time.

Larry Philpot, an experienced freelance photographer, created an iconic photograph of Jerry Lee Lewis, capturing a moment in time with the artist amidst the turbulence of a music concert. This photograph is the type of awe-inspiring work that can make a successful photography career. Philpot offered the photograph under a Creative Commons license, permitting members of the public to use the photos provided that the photos are properly attributed to Philpot.

Defendant Melville House copied and posted Philpot's photograph of Jerry Lee Lewis onto its website as its own, thereby infringing on Philpot's copyrighted work. In freelance photography, the reputation and licensing revenue guarded by copyright law are a photographer's sole means to support their career. Melville House stole both of those from Philpot. Larry Philpot brings this action to protect not just his rights under copyright law, but also his livelihood as a photographer.

II.

PARTIES

A. Plaintiff

1. Plaintiff Larry G. Philpot is a citizen and resident of the State of Indiana. Philpot is a renowned freelance photographer who specializes in photographing concerts and musical performances across the United States.

B. Defendant

2. Defendant Melville House Publishing, LLC is a New Jersey limited liability company with its principal place of business in New York that may be served via its registered agent, Valerie Merians, at 1231 Park Avenue, Apt. 6, Hoboken, New Jersey 07030-4424 or wherever she may be found.

III.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this civil action presents a federal question as Plaintiff presents a civil claim arising under the Constitution, laws, or treaties of the United States.

4. This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1338(a) because this civil action arises under an Act of Congress relating to copyrights, namely the Copyright Act of the United States, 17 U.S.C. § 101, *et seq.*

5. This Court has personal jurisdiction over Melville House Publishing, LLC because it is a New Jersey limited liability company and because its principal place of business is in the State of New York.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and 1400(a) because Defendant Melville House Publishing, LLC resides and may be found in this District.

IV.

FACTUAL BACKGROUND

A. The Highly Competitive World of Freelance Concert Photography

7. To say that concert photography is a tough business is a severe understatement. Before having the opportunity to even take a photo, concert photographers must invest in expensive equipment and negotiate to obtain access to the concert stage. At the concert, they must battle all the variables that arise from an uncontrolled setting—a rowdy crowd, horrible lighting that is always changing, and musicians constantly moving. Not to mention, it is really loud. As a result, despite all of their efforts and hard work, concert photographers often take photographs that are entirely unusable, where the rock stars appear as blurs and washy blobs.

8. Financially, it can be difficult to maintain a steady income stream from concert photography. Freelance concert photographers only earn money when they license or sell their work product. If the photographs are unusable, which is often the case, or simply aren't good, then the photographers do not receive any type of payment.

9. And, in today's technological age where anyone with a smart phone can take pictures at concerts, concert photography is becoming significantly more competitive, making it even more imperative to capture *the* perfect shot. Because that is all that there is demand for—a few once-in-a-lifetime shots for each star. It doesn't matter if a concert photographer takes 100 good shots of a star at a concert—an article about Jerry Lee Lewis, for example, only needs one picture of Jerry Lee Lewis—*the best one*.

10. In such a competitive environment, it is essential that concert photographers receive the compensation and credit to which they are entitled, but also need to advance their career.

B. Larry Philpot: A Professional Concert Photographer

11. Larry Philpot is a renowned freelance photographer who specializes in taking photographs of musicians at concerts and other performances. Philpot has invested tens of thousands of dollars in equipment and has spent years perfecting his craft. He has established a strong reputation for himself and his work, and due to his professional reputation, he often obtains privileged access to take photographs of musical performers at concerts.

12. Philpot's reputation as a premier photographer is critical to his business. The more his photographs are viewed with proper attribution provided to him, the more access he can obtain to take celebrity photographs, and the more he can command in licensing fees.

13. Philpot regularly licenses his photographs to end customers, including Rolling Stone—it is how he earns his living and expands his business. Philpot has also licensed his photographs to premier musicians, including KISS, John Mellencamp, and Kid Rock.

C. Philpot Creates the Jerry Lee Lewis Photograph

14. On April 30, 2011, Philpot created a photograph of Jerry Lee Lewis in Memphis, Tennessee (the “Jerry Lee Lewis Photo”). A true and correct copy of the Jerry Lee Lewis Photo is attached as Exhibit A.

15. The Jerry Lee Lewis Photo is an original work that Philpot registered with the United States Copyright Office as part of a collection of photographs on May 17, 2013. The Jerry Lee Lewis Photo is registered with the United States Copyright Office under Certificate Number VAu 1-164-648. A copy of the copyright registration certificate for the Jerry Lee Lewis Photo is attached as Exhibit B.

16. As the owner of the copyright in the Jerry Lee Lewis Photo, Philpot has the exclusive rights to (1) reproduce the Jerry Lee Lewis Photo in copies, (2) prepare derivative works based on the Jerry Lee Lewis Photo, (3) distribute copies of the Jerry Lee Lewis Photo to the public by sale or other transfer of ownership, or by rental, lease, or lending, and (4) display the Jerry Lee Lewis Photo publicly.

17. Philpot first displayed the Jerry Lee Lewis Photo on October 4, 2013 on the Wikimedia website. The original full-sized photo can be found at https://commons.wikimedia.org/wiki/File:Jerry_Lee.jpg. A copy of this webpage with the Jerry Lee Lewis Photo is attached as Exhibit C.

18. The Jerry Lee Lewis Photo has become one of the most widely-viewed pictures of Jerry Lee Lewis.

D. The Creative Commons License

19. A Creative Commons license is a simple, standardized copyright license that anyone can use to license their work. The copyright holder designates their work as governed by

a Creative Commons license, and anyone may use the work provided they adhere to the terms of the license.

20. In an effort to market his freelance photography practice, Philpot offered the Jerry Lee Lewis Photo through Wikimedia for distribution, public display, and public digital performance under a Creative Commons Attribution-ShareAlike 3.0 Unported Generic license (abbreviated as “CC BY-SA 3.0”). A copy of the CC BY-SA 3.0 license is attached as Exhibit D.

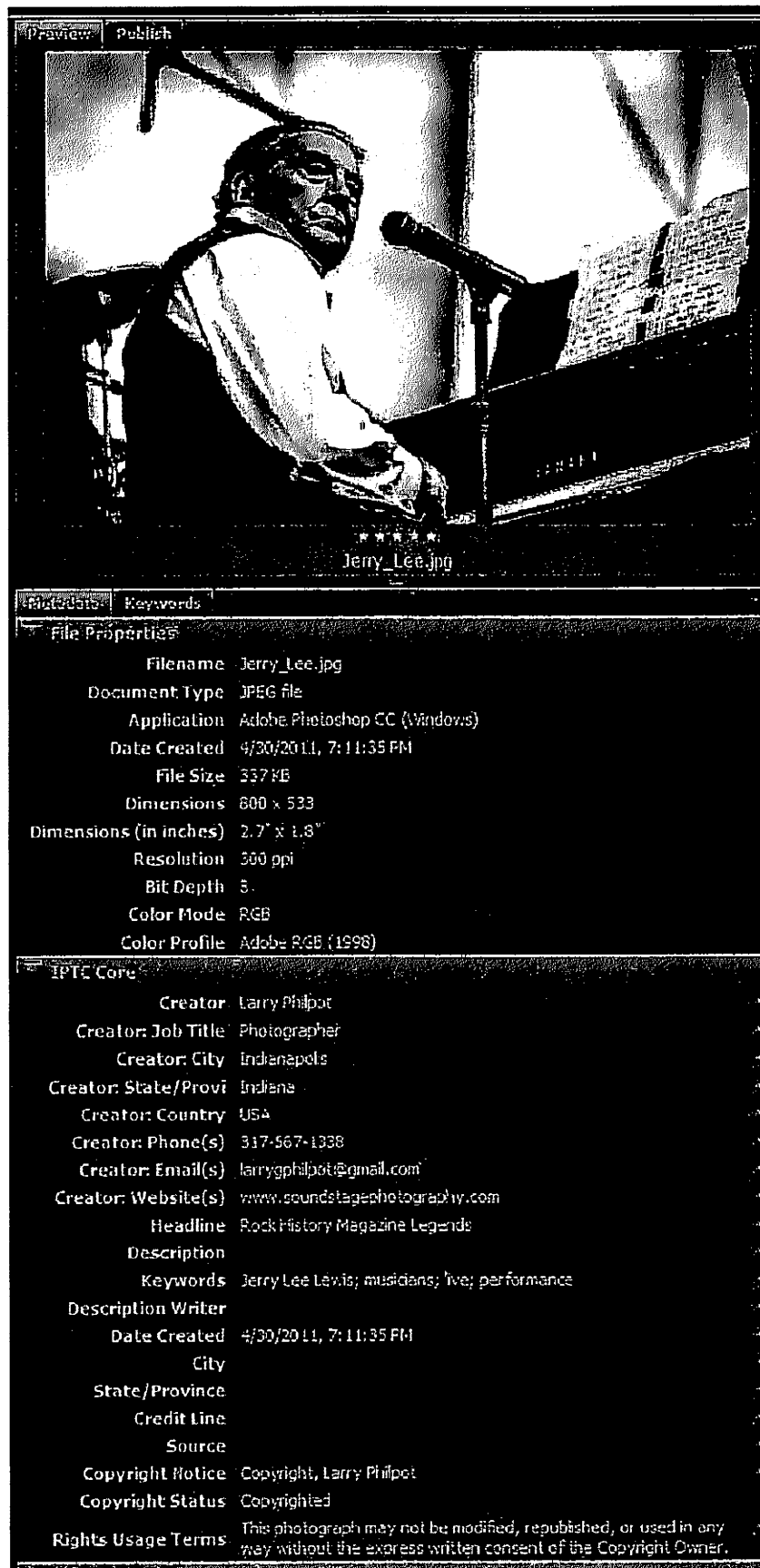
21. This license allows anyone to use the work, provided that they, among other requirements:

- a. Include a copy of the Uniform Resource Identifier for the CC BY-SA 3.0;
- b. Provide attribution to the author of the work; and
- c. Provide the Uniform Resource Identifier that the licensor specifies to be included with the work.

E. Restrictions on the Jerry Lee Lewis Photo

22. At the Wikimedia website, Larry Philpot provided the following description for the Jerry Lee Lewis Photo, “English: Jerry Lee Lewis performs in Memphis.” Philpot also provided the following attribution requirement: “Attribution should be: Photo credit: Larry Philpot, www.soundstagephotography.com.”

23. Additionally, the Jerry Lee Lewis Photo contains specific metadata identifying Larry Philpot as the creator and that the work is copyrighted:



F. Melville House Infringes Philpot's Copyright in the Jerry Lee Lewis Photo.

24. At all relevant times, Melville House owned and operated the website located at www.mhpbooks.com.

25. Melville House used and uses the website at www.mhpbooks.com for financial gain by selling advertising to third parties.

26. Melville House infringed Philpot's copyright in the Jerry Lee Lewis Photo by publishing, copying, and displaying the Jerry Lee Lewis Photo on the www.mhpbooks.com website at www.mhpbooks.com/memoir-by-bob-dylan-confidante-attracts-worldwide-interest/ and www.mhpbooks.com/michael-chabon-pop-lyricist/. A copy of these webpages as these appeared with the Jerry Lee Lewis Photo is attached as Exhibit E.

27. Melville House did not provide attribution to Philpot when it published the Jerry Lee Lewis Photo.

28. Melville House did not list or link to Philpot's website, soundstagephotography.com when it published the Jerry Lee Lewis Photo.

29. Philpot discovered these infringements on October 2, 2015.

30. Additionally, Melville House removed and altered the copyright management information in the metadata of the Jerry Lee Lewis Photo that identified Larry Philpot as the creator and that the image is copyrighted. Specifically, Melville House:

- a. Removed the title "Jerry_Lee.jpg" from the metadata of the Jerry Lee Lewis Photo;
- b. Removed the name of the creator, "Larry Philpot," from the metadata of the Jerry Lee Lewis Photo;
- c. Removed the phone number of the creator, "317-567-1338," from the metadata of the Jerry Lee Lewis Photo;

- d. Removed the website of the creator, “www.soundstagephotography.com,” from the metadata of the Jerry Lee Lewis Photo;
- e. Removed the date of creation, “4/30/2011, 7:11:35 PM,” from the metadata of the Jerry Lee Lewis Photo;
- f. Removed the copyright notice, “Copyright, Larry Philpot,” from the metadata of the Jerry Lee Lewis Photo;
- g. Removed the copyright status, “Copyrighted,” from the metadata of the Jerry Lee Lewis Photo;
- h. Removed the rights usage terms, “This photograph may not be modified, republished, or used in any way without the express written consent of the Copyright Owner,” from the metadata of the Jerry Lee Lewis Photo; and
- i. Altered the copyright status in the metadata of the Jerry Lee Lewis Photo to “Unknown.”

G. The Damage Done

31. Melville House passed off Philpot’s Jerry Lee Lewis Photo as its own, ignoring Philpot’s primary requirement under the Creative Commons license to allow Melville House to use his copyrighted work—the credit. Philpot has been deprived of the credit for taking the exceptional Jerry Lee Lewis Photo.

32. Additionally, Melville House removed and altered the metadata from the Jerry Lee Lewis Photo, thereby creating the impression that the Jerry Lee Lewis Photo is in the public domain and exposing it to further copying by third parties without any notice that the image is copyrighted by Philpot.

V.

CLAIMS

A. Count One: Copyright Infringement

33. Plaintiff realleges and incorporates the allegations set forth in the preceding paragraphs as if set forth in full herein.

34. Defendant operate and operated the website located at www.mhpbooks.com.

35. Defendant published, copied, and displayed the Jerry Lee Lewis Photo at www.mhpbooks.com/memoir-by-bob-dylan-confidante-attracts-worldwide-interest/.

36. Defendant published, copied, and displayed the Jerry Lee Lewis Photo at www.mhpbooks.com/michael-chabon-pop-lyricist/.

37. Defendant's acts are and were performed without the permission, license, or consent of Plaintiff.

38. Defendant acted with willful disregard of the laws protecting Plaintiff's copyrights.

39. Defendant infringed Plaintiff's copyrights in the Jerry Lee Lewis Photo in violation of 17 U.S.C. § 501.

40. Plaintiff has sustained and will continue to sustain substantial damage in an amount not yet fully ascertainable, including but not limited to damage to his business reputation and goodwill.

41. Plaintiff is informed and believes and thereon alleges that the Defendant has obtained profits recoverable under 17 U.S.C. § 504. Plaintiff will require an accounting from the Defendant of all monies generated from the Jerry Lee Lewis Photo.

42. In the alternative and at his election, Plaintiff is entitled to seek maximum statutory damages for each work willfully infringed by Defendant in an amount of \$150,000 per work infringed.

43. Plaintiff has suffered and continues to suffer irreparable harm and damage as a result of the above-described acts. Accordingly, Plaintiff seeks permanent injunctive relief pursuant to 17 U.S.C. § 502, as well as seizure of the Jerry Lee Lewis Photo.

44. Plaintiff is entitled to recover from the Defendant his attorney's fees and costs of suit, pursuant to 17 U.S.C. § 505.

B. Count Two: Removal of Copyright Management Information

45. Plaintiff realleges and incorporates the allegations set forth in the preceding paragraphs as if set forth in full herein.

46. Defendant, without Plaintiff's knowledge, permission, or authorization, intentionally removed and/or altered copyright management information for the Jerry Lee Lewis Photo by removing the metadata for the Jerry Lee Lewis Photo that contained Plaintiff's copyright management information, in violation of 17 U.S.C. § 1202(b)(1).

47. Defendant, without Plaintiff's knowledge, permission, or authorization distributed the altered copyright management information for the Jerry Lee Lewis Photo knowing that the copyright management information had been removed or altered without the authority of Plaintiff or the law, in violation of 17 U.S.C. § 1202(b)(2).

48. Defendant, without Plaintiff's knowledge, permission, or authorization distributed the Jerry Lee Lewis Photo knowing that copyright management information had been removed or altered without the authority of Plaintiff or the law, knowing or having reasonable grounds to know that such acts will induce, enable, facilitate, or conceal an infringement of copyright, in violation of 17 U.S.C. § 1202(b)(3).

49. Defendant's removal or alteration of copyright management information from the Jerry Lee Lewis Photo was and is willful and intentional, and was and is executed with full knowledge of Plaintiff's rights under Copyright Law, and in disregard of those rights.

50. Plaintiff is entitled under 17 U.S.C. § 1203(b)(1) to the entry of permanent injunctive relief to prevent or restrain Defendant from removing Plaintiff's copyright management information or distributing Plaintiff's copyrighted works knowing that such copyrighted information has been unlawfully removed or altered.

51. Plaintiff is entitled to the impoundment of any and all devices or products that is in the control or custody of Defendant that was involved in the removal, alteration, or the display of altered copyright management information for the Jerry Lee Lewis Photo pursuant to 17 U.S.C. § 1203(b)(2).

52. Plaintiff is entitled to recover his actual damages suffered as a result of the violation and any profits of Defendant attributable to the violation and not taken into account in computing actual damages, or, at Plaintiff's election, statutory damages pursuant to 17 U.S.C. § 1203(c).

53. Plaintiff is entitled to recover costs and attorney's fees from Defendant pursuant to 17 U.S.C. § 1203(b)(4) and (5).

VI.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

VII.

RELIEF REQUESTED

WHEREFORE, Plaintiff demands that judgment be entered against Defendant as follows:

1. Pursuant to 17 U.S.C. § 502, that Defendant, its agents, servants, employees, representatives, successors and assigns, and all persons, firms, corporations, or other entities in active concert or participation with Defendant, be permanently enjoined from directly or indirectly infringing the Plaintiff's copyrights in any manner, including generally, but not limited to

reproducing, distributing, displaying, performing or making derivatives of any of the Jerry Lee Lewis Photo;

2. Pursuant to 17 U.S.C. § 1203(b)(1), that Defendant, its agents, servants, employees, representatives, successors and assigns, and all persons, firms, corporations, or other entities in active concert or participation with Defendant, be permanently enjoined from directly or indirectly removing or altering Plaintiff's copyright management information from any work and from distributing any of Plaintiff's works with removed or altered copyright management information;

3. Pursuant to 17 U.S.C. § 503, that Defendant be ordered to:

- a. Retrieve, to the extent possible, all copies of the Jerry Lee Lewis Photo;
- b. Inform all recipients of the Jerry Lee Lewis Photo of Plaintiff's ownership;
- c. Inform all recipients of the Jerry Lee Lewis Photo that Defendant was not authorized to reproduce, distribute, display, perform, or make derivatives of the Jerry Lee Lewis Photo;

4. Pursuant to 17 U.S.C. § 1203(b)(2), that any and all devices or products that is in the control or custody of Defendant that was involved in the removal, alteration, or the display of altered copyright management information for the Jerry Lee Lewis Photo be impounded;

5. Pursuant to 17 U.S.C. § 504, that Defendant be required to pay actual damages and disgorgement of all profits derived by Defendant from its acts of copyright infringement;

6. That Defendant be required to perform a complete and full accounting of all profits generated by Defendant from the Jerry Lee Lewis Photo;

7. Pursuant to 17 U.S.C. § 504, that upon Plaintiff's election, Defendant be required to pay statutory damages up to \$150,000 for each work infringed for its acts of copyright infringement, and in the event the factfinder determines that Defendant's infringement was not

willful, that Defendant be required to pay statutory damages up to \$30,000 for each work infringed for its acts of copyright infringement;

8. Pursuant to 17 U.S.C. § 1203(c), that Defendant be required to pay actual damages and disgorgement of all profits derived by Defendant from its acts of removing and altering Plaintiff's copyright management information in the Jerry Lee Lewis Photo;

9. Pursuant to 17 U.S.C. § 1203(c), that upon Plaintiff's election, Defendant be required to pay statutory damages up to \$25,000 for each act of removing and altering Plaintiff's copyright management information in the Jerry Lee Lewis Photo;


10. Pursuant to 17 U.S.C. §§ 505 and 1203(b)(4) and (5), Defendant be required to pay Plaintiff the costs of this action, prejudgment interest, and reasonable attorney's fees; and

11. Plaintiff be granted all other and further relief to which he is entitled.

Dated: October 1, 2018

Respectfully submitted,

HUTCHERSON LAW PLLC

/s/ 

Kenton J. Hutcherson

Texas Bar No. 24050798

Hutcherson Law PLLC

3131 McKinney Avenue, Suite 600

Dallas, Texas 75204

Tel: (214) 443-4200

Fax: (214) 443-4210

Email: kjh@hutchersonlaw.com

ATTORNEY FOR PLAINTIFF

EXHIBIT A



EXHIBIT B

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Maria A. Pallante

Register of Copyrights, United States of America

Registration Number
VAu 1-164-648

Effective date of
registration:
May 17, 2013

Title

Title of Work: All unpublished photos 2008 to May 2013

Completion/Publication

Year of Completion: 2013

Author

■ Author: Larry Gene Philpot

Author Created: photograph(s)

Work made for hire: No

Citizen of: United States

Domiciled in: United States

Year Born: 1953

Copyright claimant

Copyright Claimant: Larry Gene Philpot

12527 Winding Creek Lane, Indianapolis, IN, 46236

Rights and Permissions

Name: Larry Philpot

Email: larry@behindthemusic.net

Telephone: 317-567-1338

Address: 12527 Winding Creek Lane

Indianapolis, IN 46236 United States

Certification

Name: Larry G. Philpot

Date: May 14, 2013

Registration #: VAU001164648

Service Request #: 1-935196132



Larry G. Philpot
12527 Winding Creek Lane
Indianapolis, IN 46236 United States

EXHIBIT C



File:Jerry Lee.jpg

From Wikimedia Commons, the free media repository



No higher resolution available.

Jerry_Lee.jpg (800 × 533 pixels, file size: 337 KB, MIME type: image/jpeg)

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Information
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Summary

Description	English: Jerry Lee Lewis performs in Memphis
Date	30 April 2011, 19:11:35
Source	Own work
Author	Larry Philpot Attribution should be: Photo credit: Larry Philpot, www.soundstagephotography.com .

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Camera manufacturer	Canon
Camera model	Canon EOS-1Ds Mark III
Author	Larry Philpot
Copyright holder	Copyright, Larry Philpot
Exposure time	1/250 sec (0.004)
F-number	f/2.8
ISO speed rating	100
Date and time of data generation	19:11, 30 April 2011
Lens focal length	148 mm

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EXHIBIT E

